No. 90-726

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MITCHELL'S FORMAL WEAR, INC.,
Petitioner,

v.

KENTUCKY OAKS MALL COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of Ohio correctly assert personal jurisdiction over a nonresident corporation in an action arising from the nonresident's refusal to pay rent and other obligations due in Ohio, when the nonresident's minimum contacts with Ohio include those and other continuing obligations it agreed to perform in Ohio and did partly perform in Ohio under a shopping-mall lease creating a 10-year interdependent relationship with an Ohio resident plus other contacts substantially similar to those found to comport with due process in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), although a choice-of-*law* clause provides Kentucky law governs that lease of Kentucky premises?

LIST OF PARTIES & RULE 29.1 LIST

Respondent is satisfied with Petitioner's List of Parties and Rule 29.1 List and makes this further disclosure. Respondent Kentucky Oaks Mall Company is an Ohio limited partnership. Its general partners are William M. Cafaro, an individual residing in Ohio, Anthony M. Cafaro, an individual residing in Ohio, and Eastwood Mall, Inc., an Ohio corporation. Eastwood Mall, Inc. has no parent company, and both it and its subsidiaries are closely held and are not publicly traded companies. One of Respondent's limited partners is JCP Realty, Inc., a Delaware corporation. The parent company of JCP Realty, Inc. is J.C. Penney Company, Inc., a Delaware corporation. JCP Realty, Inc. has no subsidiaries (other than those wholly owned). Respondent's other limited partner is Paducah Development Company, a Kentucky general partnership. Kentucky Oaks Corp., an Ohio corporation, is the only corporation with any direct or indirect ownership interest in Paducah Development Company. Kentucky Oaks Corp. has no parent company or subsidiaries.

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Respondent respectfully urges this Court to deny the writ of certiorari.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 53 Ohio St. 3d 73, 559 N.E.2d 477 (1990). Petitioner

properly states the lower court opinions in this case are unreported. The reproduction of all three opinions in the appendix to the petition appears to be accurate except for immaterial typographical errors.

JURISDICTION

Respondent is satisfied with the statement of jurisdiction set forth in the Petition for a Writ of Certiorari.

CONSTITUTIONAL PROVISION, STATUTE, & RULE

The texts of the constitutional provision, U.S. Const. amend XIV, § 1, the statute, Ohio Rev. Code Ann. § 2307.382 (Anderson Supp. 1989), and the rule, Ohio Civ. R. 4.3, involved in the case are properly set out (except for immaterial typographical errors) in the Petition for a Writ of Certiorari (Pet. 3-5).

STATEMENT OF THE CASE

This case is about the personal jurisdiction of an Ohio court predicated on the particular facts of the interdependent relationship created by a shopping-mall lease between Petitioner and Respondent. While some of what Petitioner says in the first two paragraphs of its Statement of the Case is accurate, as reiterated briefly below, Petitioner's other statements are not accurate. Conspicuously absent from Petitioner's statement are most of the details of that relationship, many of which the Ohio Supreme Court described and relied on in its unanimous opinion below.

Respondent is Kentucky Oaks Mall Company, an Ohio limited partnership affiliated with The Cafaro Company, one of the largest developers of retail shopping malls in the United States. (Pet. 6, 31a.) Petitioner is Mitchell's Formal Wear, Inc., a Georgia corporation. (*Id.*) Petitioner operates 101 stores, including stores outside Georgia, in 11 states. (Pet. 6, 3a.) It has also entered into leases with other Ohio residents besides Respondent, such as Jacobs Visconsi & Jacobs ("JVJ"), which Petitioner knows has its home office in Cleveland, Ohio. (p. 3a-4a, *infra.*)

In 1985, Petitioner knowingly negotiated a lease by mail and telephone with Respondent in Youngstown, Ohio. (Pet. 6, 3a.) Petitioner signed the Lease in Georgia and mailed it to Respondent in Ohio. (*Id.*) Respondent then signed and accepted the Lease in Ohio. (Pet. 4a.) The Lease became effective in Youngstown, Ohio. (Cl. 43; Pet. 71a.)[1] Consequently, Petitioner, as Tenant,

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[1] Although not a determinative fact, Petitioner argues, for the first time, that the Lease became effective in Georgia. (Pet. 6.) Apparently, Petitioner reads "delivery" to mean actual receipt by Petitioner. This, however, con-

entered into a Lease with Respondent, as Landlord, for a shopping center storeroom known as unit #640 in the Kentucky Oaks Mall. (Pet. 3a, 31a.) Although the shopping center is located in Kentucky, the home office of Respondent is located in Youngstown, Ohio, as identified in the first sentence of the Lease. (Pet. 4a, 31a.)

Petitioner knowingly created ongoing obligations to an Ohio resident and agreed to the exacting regulation of its business by Respondent from Ohio. (Pet. 9a.) The Lease is for ten years and requires Petitioner to remit rent, maintenance costs, merchants association fees and various other payments monthly and annually to Respondent in Ohio. (Cls. 3, 4, 5, 10, 11, 21G, 26, 32, 33; Pet. 4a, 33a-36a, 43a-46a, 55a, 62a, 65a-68a.) The Lease also requires Petitioner to obtain various approvals from and periodically submit gross sales reports and various other certificates and signed documents to Respondent in Ohio. (Cls. 2, 5, 6, 7, 8, 14, 15, 16, 21, 29, 30, 35; Pet. 32a-33a, 35a-43a, 48a-50a, 51a-55a, 63a-64a, 68a-69a.) The Lease regulates, for example, liability (Cls. 24, 27; Pet. 57a, 62a); defaults (Cl. 24; Pet. 57a); termination (Cls. 24, 31; Pet. 57a, 65a); assignment and subletting (Cl. 16; Pet. 49a); insurance (Cl. 21; Pet. 51a); auditing of gross sales (Cl. 5; Pet. 37a); percentage rent computed from gross sales (Cl. 5; Pet. 35a); business use and name (Cl. 6; Pet. 37a); hours of operation (*id.*); construction and building layout (Cl. 2 & Exhibit A; Pet. 32a, 76a.); signs and displays (Cls. 7(B)(1), (2), 8 & Exhibit B; Pet. 41a, 42a, 81a); advertis-

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tradicts the intent of the parties reflected in Clause 42 of the Lease (Pet. 71a). That clause marks the time of mailing as the time of rendition and expressly states a sole—and different—circumstance when delivery means actual receipt. Since the parties knew how to expressly require actual receipt but did not say that in Clause 43, delivery of the Lease was completed upon mailing it in Ohio.

ing and promotion (Cls. 7(A)(5), (6), 7(B)(5), 32; Pet. 39a, 42a, 65a); cleanliness (Cls. 7(A)(1), (9), 12; Pet. 39a-40a, 47a), and even vending machines (Cl. 7(B)(8); Pet. 42a). Petitioner is required to send all payments and communications to Respondent at its home office in Ohio. All payments must be actually received by Respondent. (Cl. 42.; Pet. 71a.)

In the course of dealing, Petitioner has sent rent, maintenance cost, and merchants association fee payments, certificates of sales reports, and other communication to Respondent in Ohio. (Pet. 6, 8a-9a; p. 4a-7a, *infra.*) Respondent is one of the few persons to whom Petitioner discloses its confidential sales reports, other than the I.R.S. and the state. (p. 7a, *infra.*) Indeed, Petitioner also sent a proposed lease cancellation agreement signed only by it, along with a letter and a check, to Respondent in Ohio. (Pet. 19a; p. 1a, *infra.*)

Petitioner, however, defaulted by failing to pay all the amounts the Lease requires Petitioner to pay in Ohio to Respondent. As a result, the present cause of action arose. (Pet. 3a.)

Petitioner's statement of the procedural history of the case in the common pleas court and court of appeals is accurate as far as it goes, but omits several facts. The Lease does not specify where a lawsuit may or may not be brought. (Pet. 31a.) Therefore, on January 8, 1988, Respondent sued Petitioner in Ohio. (Pet. 6, 3a.) When the common pleas court heard the dismissal motion, testimony and documentary evidence were presented, including the Lease. (p. 2a, *infra.*) Petitioner's President, Joseph B. Doyle, who had been its president for ten years and who had signed the Lease on behalf of Petitioner, testified. (p. 3a, *infra.*) Under oath, he admitted knowing that various Lease provisions regulate

Petitioner, require it to obtain approvals from Respondent in Ohio, and require Petitioner to direct payments, sales reports, and other communication to Ohio for ten years. (p. 4a-7a, *infra.*) However, the common pleas court dismissed the case because it found:

> the contract [sic] between Defendant and the State of Ohio insufficient to make it fair and reasonable for the out-of-state corporation to defend a suit in this jurisdiction.

(Pet. 17a.)

The Ohio court of appeals affirmed on June 29, 1989. (Pet. 11a.) The *sole* reason given by the court of appeals to support its judgment was that Clause 44 of the Lease (Pet. 72a)[2] provides the Lease shall be governed by and construed in accordance with the applicable laws of the State of Kentucky. (Pet. 15a-16a.)

On August 8, 1990, the unanimous Ohio Supreme Court reversed and remanded for further proceedings. (Pet. 2a.) Petitioner, however, misrepresents the decision of the Ohio Supreme Court. While Petitioner correctly describes and quotes the court's decision on the state law grounds under the Ohio long-arm statute and rule (Pet. 8), Petitioner distorts the court's decision under the Due Process Clause of the Fourteenth Amendment. The court did conclude the exercise of jurisdiction over Petitioner comports with due process, but the reason was *not* as Petitioner misrepresents:

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[2] The reproduction of the Lease in the appendix to the petition includes Clause 44, "Governing Law," *twice*, apparently due to typographical error. The actual Lease in the record contains only one Clause 44.

> merely because petitioner conducts business outside Georgia and entered into a lease with an Ohio-based limited partnership.

(Pet. 9.) Rather, the court thoroughly reviewed the record and carefully followed this Court's precedent in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985). Its unanimous conclusion was based on Petitioner's dealings with Respondent in Ohio, creation of the continuing obligations Petitioner is to perform in Ohio, breach of those obligations causing foreseeable injury in Ohio, and failure to present a compelling case that jurisdiction would be unreasonable—in addition to the reasons given by Petitioner. (Pet. 6a-10a.)

Petitioner filed its Petition for a Writ of Certiorari on November 5, 1990, which Respondent received on November 7, 1990. To set the record straight, Respondent now explains the reasons why the case should not be reviewed by this Court.

REASONS FOR DENYING THE WRIT

Petitioner would have this Court believe that all seven Justices of the Ohio Supreme Court somehow disregarded every personal-jurisdiction precedent of this Court and expanded personal jurisdiction by basing it simply on Petitioner's sending rent payments to Ohio. But that is not this case. The petition produces a greatly distorted reflection of the true aspect of this case. The decision below is not "confusing," as Petitioner contends. (Pet. 17.) It is Petitioner who tries to create the illusion of confusion by rewriting the opinion below and ignoring the facts. Contrary to Petitioner's meritless arguments, (1) the unanimous Ohio Supreme Court (a) did follow the *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), test and (b) did correctly apply *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), to the analogous facts of this case, (2) the unanimous decision below does not conflict with any comparable decisions of other jurisdictions, and (3) the unanimous decision, which is based on both Ohio and federal law, does not mean all lessees nationwide will be haled into court in every state where they fail to perform their contractual obligations. In sum, this case does not present any important questions worthy of this Court's review.

I. THE UNANIMOUS OHIO SUPREME COURT CORRECTLY FOLLOWED THE PRECEDENTS OF THIS COURT, WHICH CONTROLLED THE OUTCOME BELOW.

The decision below and the facts of this case do not raise the specific question presented in the petition. (Pet. i.) At best, the only question presented by Petitioner is whether the quality and nature of *all* its contacts with Ohio are such that "maintenance of the suit [in Ohio] does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

> Such questions generally tend to depend on the particular facts of each case, and I believe that only a marked departure by a lower court in the application of established law would persuade four Justices to grant certiorari. [T]here is no indication that it [the lower court] failed to apply the due process standards enunciated in *International Shoe*, and cases which have followed it, to the circumstances presented, and, therefore, I believe it unlikely that this issue would command the votes necessary for certiorari.

United Methodist Church v. *Superior Court*, 439 U.S. 1369, 1373-74 (1978) (Rehnquist, Circuit Justice), *cert. denied*, 439 U.S. 912 (1978). The Ohio Supreme Court neither markedly departed from nor failed to apply the due process standards enunciated in *International Shoe* and its progeny to the particular facts of this case. Therefore, this Court should deny certiorari in this case too.

A. The Unanimous Ohio Supreme Court Correctly Followed All The Steps Of *International Shoe*.

By quoting passages from the opinion below out of context, Petitioner misleadingly suggests the court below did not follow all the steps of inquiry mandated by *International Shoe* and its progeny. As is clear from the actual text of its opinion, however, the unanimous Ohio Supreme Court correctly identified and analyzed all the steps of the *International Shoe* test. At the outset of Part II of the opinion,[3] the court acknowledged:

> Over forty years ago, in *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, the court announced that a state may assert personal jurisdiction over a nonresident defendant if the nonresident has "* * * certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (Citation omitted.) *Id.* at 316.

(Pet. 7a.) Of course, the court recognized this test consists of separate steps. Identifying the first step, the court said:

> "[T]he constitutional touchstone remains whether the defendant *purposefully* established 'minimum contacts' in the forum State. *International Shoe Co.* v. *Washington*, *supra*, at 316." (Emphasis added.) *Id.* at 474. The nonresident defendant has purposefully established minimum contacts

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[3] Part I of the opinion answered the threshold question of whether Petitioner was "transacting any business" in Ohio within the meaning of Ohio's long-arm statute and rule. (Pet. 5a.) That question of state law is not raised in the petition and is not reviewable in any event.

> "* * * where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State * * * where the defendant 'deliberately' has engaged in significant activities within a State * * * *or* has created '*continuing obligations*' between himself and residents of the forum * * * he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in the forum as well." (Citations omitted and emphasis added in part.) *Id.* at 475-476. Furthermore, minimum contacts are satisfied when the defendant foreseeably causes injury in the forum state if " '* * * the defendant's conduct and connection with the forum .State are such that he should reasonably anticipate being haled into court there.' * * *" *Id.* at 474 (quoting *World-Wide Volkswagen Corp.* v. *Woodson* [1980], 444 U.S. 286, 297).

(Pet. 7a-8a) (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474-76 (1985)). The court next identified the second step:

> [T]he question of whether personal jurisdiction exists does not end with a finding that the nonresident defendant has purposely established minimum contacts . . .:
>
> "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction

> would comport with '*fair play and substantial justice.*' "

(Pet. 8a) (quoting *Burger King*, 471 U.S. at 476-77).

Contrary to Petitioner's contention (Pet. 10, 11, 13), the Ohio Supreme Court did not ignore the "minimum contacts" step. Rather, the court specifically did analyze Petitioner's "minimum contacts" with Ohio *first*, and then turned to the "fair play and substantial justice" step.

> In light of the guidelines articulated above, and after a thorough review of the record before us, it is apparent that Mitchell's [Petitioner] *purposefully directed* activities at an Ohio-based limited partnership, so that it could *reasonably anticipate being haled into* an Ohio court. Moreover, it is equally evident that the assertion of personal jurisdiction over Mitchell's comports with *fair play and substantial justice.*
>
> . . . .
>
> Whether a nonresident defendant purposefully established minimum contacts with the forum depends upon the dealings between the parties prior to and following the document's execution, contemplated future consequences, *along with the terms* of the contract. . . . [C]onsidering Mitchell's dealings and the creation of continuing duties and obligations with appellant [Respondent], we are satisfied that the guidelines set forth in *Burger King* have been met.
>
> Having found that Mitchell's purposefully established minimum contacts with Ohio, it now remains only to inquire whether the assertion of jurisdiction comports with "fair play and substantial justice."

(Pet. 8a-9a) (citation omitted). Only then did the court consider the "other factors" of Respondent's interest in litigating in Ohio, the State's interest in providing its citizens a forum, and the lack of burden on Petitioner. (Pet. 9a-10a.)

Consequently, when Petitioner claims that the court erred by giving the "other factors" paramount importance over Petitioner's purposefully establishing contacts with Ohio (Pet. 13), Petitioner contradicts the explicit reasoning of the Ohio Supreme Court. Likewise, this case does not conflict with *Hanson* v. *Denckla*, 357 U.S. 235 (1958), *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), or *Rush* v. *Savchuk*, 444 U.S. 320 (1980). Trying to create an appearance of conflict, Petitioner quotes out of context the court's consideration of the "other factors." (Pet. 11.) But the differences between the material facts of this case and each of those decisions could not be more complete. Moreover, Petitioner's misreading of the opinion below doubtless is the result of its misreading of *Burger King*. Attempting to support its theory that a court cannot consider these "other factors" to have such great importance as to save jurisdiction when minimum contacts are few, Petitioner quotes from *Burger King* concerning the consideration of these "other factors" but abruptly stops short. (Pet. 13.) The very next sentence after the quoted passage makes clear that the consideration of "other factors" is not wholly divorced from the minimum-contacts analysis and may even save jurisdiction:

> These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would other-

> wise be required. See, *e.g.*, *Keeton* v. *Hustler Magazine, Inc.*, *supra*, at 780; *Calder* v. *Jones*, *supra*, at 788-789; *McGee* v. *International Life Insurance Co.*, *supra*, at 223-224.

Burger King, 471 U.S. at 477. Unlike Petitioner, the Ohio Supreme Court accurately quoted both passages and correctly recognized the reinforcing effect of these "other factors." (Pet. 8a.)

Therefore, the Ohio Supreme Court did not depart from the established due process standards. The correctness of the court's weighing of the particular facts is discussed next.

B. The Unanimous Ohio Supreme Court Correctly Applied The Due Process Standards of *Burger King* To The Analogous Facts In The Record Of This Case.

The unanimous opinion below does not conflict with *Burger King* because the Ohio Supreme Court correctly applied the principles enunciated in *Burger King* to the substantially similar facts of this case. This Court resolved the uncertainty of determining minimum contacts based on a contract by identifying the factors that must be evaluated in contract cases:

> prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing.

471 U.S. at 478-79. These factors remain especially workable guides and were expressly evaluated below by the Ohio Supreme Court:

> Although the lease contains a choice-of-law

> provision, this, standing alone, does not automatically defeat a finding that minimum contacts exist. *Burger King*, *supra*, at 478. Whether a nonresident defendant purposefully established minimum contacts with the forum depends upon the dealings between the parties prior to and following the document's execution, contemplated future consequences, *along with the terms* of the contract. *Id.* at 479. We are aware that the choice-of-law provision may be a significant factor in the overall picture; however, considering Mitchell's dealings and the creation of continuing duties and obligations with appellant, we are satisfied that the guidelines set forth in *Burger King* have been met.

(Pet. 9a.)

The court reached this result because the record contains facts substantially similar to the facts in *Burger King*. (Pet. 7a.) Some of those facts are described in the opinion below:

> Mitchell's conducted negotiations of the lease terms by telephone contact to Ohio with appellant, an Ohio-based limited partnership. Mitchell's intentionally and *purposefully* directed activities at Ohio when it agreed to the contract terms, signed the document in Georgia and sent it to Ohio to be signed by appellant. The ten-year lease requires that Mitchell's submit to appellant on a monthly or annual basis rental payments, maintenance costs, association fees and sales reports. If Mitchell's refuses to make the contractually required payments in Ohio, as alleged by appellant, such refusal will undoubtedly cause foreseeable injuries. Further, Mitchell's is not provided with unfettered control of its retail sale

> and rental operation. The lease calls for appellant's approval in many areas and also restricts or regulates many activities. Mitchell's is also aware that all communications need to be directed to appellant in Ohio.

(Pet. 8a-9a.)

In comparison, this Court earlier upheld the assertion of personal jurisdiction over a Michigan resident by a court in Florida based on similar facts:

> Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of "a contract which had a *substantial* connection with that State." *McGee* v. *International Life Insurance Co.*, 355 U.S., at 223 (emphasis added). Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-ranging contacts with Burger King in Florida. In light of Rudzewicz's voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated." Rudzewicz's refusal to make the contractually required payments in Miami . . . caused foreseeable injuries to the corporation in Florida. For these reasons, it was, at the very least,

> presumptively reasonable for Rudzewicz to be called to account there for such injuries.

471 U.S. at 479-80 (citations omitted).

Based on Petitioner's prior negotiations and subsequent dealings with Respondent in Ohio, creation of continuing obligations to be performed in Ohio, and acceptance of extensive regulation from Ohio, this case strongly resembles *Burger King*. The Ohio Supreme Court weighed the facts correctly in favor of jurisdiction.

In both cases, the contracts include comprehensive leases. *Cf.* 471 U.S. at 464. Petitioner's attempt to distinguish the Lease from a franchise and limit *Burger King* to franchise cases ignores the reality of the relationship and puts form before substance. Although this case does not involve a typical franchise, the shopping-mall lease creates a similar long-term, interdependent relationship. "Eschewing the option of operating an independent local enterprise," Petitioner chose to be identified with the name and success of Respondent's shopping mall. By doing so, Petitioner sought to derive benefits not only from Respondent but also from the expertise of one of the nation's largest shopping mall developers affiliated with Respondent.

Ignoring *Burger King*, Petitioner makes too much of the location of the leased property and Petitioner's physical absence from the forum. In both cases, the leased property is outside the forum, the nonresident was not physically present in the forum, and the nonresident communicated by mail and telephone with the forum. *Cf. id.* at 466, 476, 479, 481.

Moreover, in both cases, the lease requires the

nonresident to perform continuing obligations in the forum, such as making periodic payments there, including percentage rent computed from gross sales. Both contracts exactingly regulate from the forum many of the same things, such as liability, defaults, termination, assignments, insurance, auditing, business use and name, hours of operation, building layout, displays, advertising and promotion, cleanliness, and even vending machines. *Cf.* p. 4-5, *supra*, *with* 471 U.S. at 464-65, n. 4.

Petitioner attempts to summarily dismiss these extensive regulations by casually calling them "incidental to the purpose of the contract—to establish a Mitchell's Formal Wear store in Paducah, Kentucky." (Pet. 12.) By that logic, the purpose of Rudzewicz's contract with Burger King was to establish a hamburger restaurant in Michigan and the regulations there were likewise "incidental"! Rather, in both cases, the regulations are part of the same deal and part of the *quid pro quo* for establishing the business location. The purpose of the regulations is the same in both cases: to assure uniformity, quality, and patron satisfaction. Just as each franchisee affects Burger King, the success and reputation of each tenant affects the success and reputation of Respondent. Thus, Respondent regulates virtually every aspect of the shopping-mall landlord-and-tenant relationship, including material aspects of the tenant's business. Petitioner's view of the object of the lease is short-sighted. As in *Burger King*, the object is not only the leased property but also the interdependent relationship that requires Petitioner to perform continuing obligations and accept regulation in Ohio.

Likewise, Petitioner's characterization of Respondent's residence as a "mere fortuitous consequence" (Pet.

12) must fail. From the beginning of the negotiations through the present, Respondent's residence has remained constant—as identified in the Lease itself. Respondent's home office in Youngstown, Ohio, with which Petitioner dealt throughout, is as "fortuitous" as Burger King's headquarters in Miami, Florida! In both cases, the contract requires the nonresident to send all notices and payments to the home office in the forum. As in *Burger King*, Petitioner knew it was dealing with a company based in the forum, where all major business decisions were made as evinced by Petitioner's sending not only the Lease, periodic payments, and sales reports, but also the lease cancellation agreement to Ohio for acceptance by Respondent. *Cf.* 471 U.S. at 480.

Petitioner's characterization of its failure to make payments in Ohio as "its alleged failure to perform its part of the contract in Georgia" (Pet. 12) ignores the express language of the Lease, *Burger King*, and long-settled law. Clause 42 expressly requires Petitioner's payments to be actually received in Ohio by the Respondent. (Pet. 71a.) *Burger King* concluded the failure to make contractually required payments from Michigan to Florida caused injury in Florida. 471 U.S. at 480. A breach occurs and the cause of action arises where payment is due. *E.g.*, *Wester* v. *Casein Co. of America*, 206 N.Y. 506, 100 N.E. 488, 490 (1912). As did this Court in *Burger King*, the Ohio Supreme Court also found that the action in this case arises from the injury to Respondent in Ohio caused by Petitioner's refusal to make the payments. (Pet. 9a.)

Therefore, Ohio's assertion of personal jurisdiction over Petitioner is presumptively reasonable. The reasonableness is also reinforced by the "other factors" identified in *Burger King*. Respondent and Ohio have

strong interests in adjudicating the dispute in Ohio, since the Ohio legislature intended to provide a forum there and Ohio has an interest in resolving suits brought by its citizens and seeing that they get the benefit of their bargains. Requiring Petitioner to defend in Ohio is not a burden in this age of modern transportation. (Pet. 9a-10a.) After all, Petitioner operates 101 stores in 11 states. It was only in this context that the court below observed that Petitioner, having ventured extensively beyond Georgia to Kentucky, can just as easily travel to the neighboring state of Ohio to defend against this action. (Pet. 9a.) The burden on Petitioner is not excessive. (Pet. 9a.) Petitioner simply failed to carry its burden of showing a compelling case of unreasonableness or unfairness. (Pet. 8a.)

Petitioner's argument reduces to the novel theory that a choice-of-law clause selecting nonforum law to govern the Lease destroys otherwise proper personal jurisdiction in the forum. This theory has never been the rule, except for the short-lived Ohio court of appeals opinion below. (Pet. 15a-16a.) Indeed, the unanimous rejection of this theory by the Ohio Supreme Court (Pet. 9a) is consistent with every other jurisdiction that has considered it.[4]

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[4] *Haisten* v. *Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1399-1400 (9th Cir. 1986) (contractual choice of Cayman Islands law "alone will not suffice to block jurisdiction" in California); *Jackam* v. *Hospital Corp. of America Mideast*, 800 F.2d 1577, 1581-82 (11th Cir. 1986) (a plaintiff may prove minimum contacts with Georgia despite contractual choice of Saudi Arabia law); *Southern Machine Co.* v. *Mohasco Indus.*, 401 F.2d 374, 382 (6th Cir. 1968) (contractual choice of New York law "cannot change the business realities of the transaction" when other facts evinced the minimum contacts necessary for jurisdiction in Tennessee); *Marine Charter & Storage Ltd.* v. *Denison Marine, Inc.*, 701 F. Supp. 930, 934-36 (D. Mass. 1988) (contractual choice of Florida law is not determinative of whether nonresident "purposefully availed itself of the benefits

Even when courts find jurisdiction does not exist, they consider the choice-of-law provision only parenthetically, attaching far greater importance to the lack of continuous obligations to or lack of regulation from the forum. *LAK, Inc.* v. *Deer Creek Enter.*, 885 F.2d 1293, 1295 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1525 (1990).

This theory should be rejected for good reason. First, such a rule would make a choice-of-law clause tantamount to a choice-of-forum clause. Second, such a rule would lead to the absurd result that personal jurisdiction in a contract case would exist if nonforum law governed because the contract was silent, but would not exist if the contract happened to include a choice-of-law clause providing nonforum law governed. *See Burger King*, 471 U.S. at 477, 483 n. 26 (jurisdiction not unconstitutional when choice-of-law rules can be applied). Third, such a rule would have a chilling effect on the voluntary inclusion of choice-of-law clauses in contracts and would increase the number of conflicts of law for the courts to untangle. Therefore, Petitioner's theory would be bad public policy.

Contrary to what Petitioner says, the court below did not ignore the dicta in *Burger King* about the effect of a choice-of-law provision and did not fail to give any weight to the Kentucky law provision. Rather, like this

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and protections of Massachusetts law"); *Wright Int'l Express* v. *Roger Dean Chevrolet*, 689 F. Supp. 788, 791 (S.D. Ohio 1988) (lease provided minimum contacts with Ohio, despite contractual choice of Florida law); *Beco Corp.* v. *Roberts & Sons Constr. Co.*, 114 Idaho 704, 760 P.2d 1120 (1988) (personal jurisdiction in Idaho despite contractual choice of Arizona law; even the lone dissenter considered the choice-of-law provision not dispositive, but only one factor).

Court, the court understood that such a provision standing alone is not sufficient but must be viewed in the greater context of *all* the jurisdictional facts. (Pet. 9a.) *Cf.* 471 U.S. at 482. The fact Petitioner relies on does not outweigh the facts supporting jurisdiction. An otherwise proper forum, such as Ohio, does not become unforeseeable simply because the law of another state applies.

Burger King, being by far the most analogous precedent, controls. Therefore, the Ohio Supreme Court correctly applied the due process standards to the facts of this case.

II. THE UNANIMOUS DECISION OF THE OHIO SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER JURISDICTION.

The unanimous decision of the Ohio Supreme Court does not conflict with the decisions of other jurisdictions. Supreme Court Rule 10.1 states in pertinent part:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> . . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Although Petitioner claims such a conflict, only one of the six cases Petitioner cites is a decision of a federal court of appeals. (Pet. 16-17.) But even that one case was decided 10 years *before* this Court's decision in *Burger King*. None of the remaining five is the decision of another state's court of last resort. While three of Petitioner's cited cases were decided after *Burger King*, only one involved federal due process. All six cases are readily distinguishable from this case so that no conflict exists.

Petitioner's reliance on *Grossman* v. *Wal-Mart Stores*, 682 F. Supp. 752 (S.D. N.Y. 1988) (suit by lessor against lessee's assignee), *Advance Realty Assocs.* v. *Krupp*, 636 F. Supp. 316 (S.D. N.Y. 1986) (suit by real estate broker against purchaser), and *DelBello* v. *Japanese Steak House*, 43 A.D.2d 455, 352 N.Y.S.2d 537 (App. Div.

1974) (suit by franchisee against franchisor) is grossly misplaced. None of these cases even mentions due process or *International Shoe* or any of its progeny. All three were decided solely on the state law grounds of what constitutes "doing business" or "transaction of business" under New York law.

Nor does the decision below conflict with *Northern Trust Co.* v. *Randolph C. Dillon, Inc.*, 558 F.Supp. 1118 (N.D.Ill. 1983). Petitioner's recitation misstates and omits several important facts. First, Petitioner mistakenly says, with emphasis, that "the defendant engaged in telephone calls with the Illinois plaintiff." This is not one of the facts from *Northern Trust*, but is a fact from one of the precedents discussed by that case. Even so, *Burger King*, decided two years later, now teaches that such telephone calls are significant contacts. Second, Petitioner omits telling that the nonresidents' *only* contacts with Illinois were the sending of lease payments there. *All* negotiations occurred in California. The nonresidents' agent had not even dealt with the Illinois office. *Id.* at 1123. In contrast, Petitioner's contacts with Ohio in this case far outnumber and outweigh merely sending payments.

Similarly, *Arthur, Ross & Peters* v. *Housing, Inc.*, 508 F.2d 562 (5th Cir. 1975), does not conflict with the decision of the Ohio Supreme Court. *Arthur, Ross* did not involve a lease and is factually and legally distinguishable. Although the federal court also discussed federal due process, its analysis of Texas law on substituted service of process provided an adequate independent state law grounds for denying jurisdiction. Texas legislation indicated only performance of a contract, and not its negotiation or execution, can be considered when determining personal jurisdiction over a

nonresident. In its summary of *Arthur*, *Ross*, Petitioner misleadingly refers to partial performance in Texas, trying to force a comparison to this case. There, however, the plaintiff unilaterally mailed its own initial payment *from* the forum. This was not sufficient "performance." But the court observed it might be a different matter if the contract expressly required payment to be made in the forum. The nonresident's only contacts were certain notices and reimbursements the contract required to be mailed to Texas, which the court held were not dispositive based on *Hanson* v. *Denckla*, 357 U.S. 235 (1958). The court also thought physical presence was necessary. 508 F.2d at 564-65. Because the facts are different in this case, including the express requirement that payments be made in the forum, and because the federal court did not have the benefit of this Court's teachings in *Burger King*, which was decided 10 years later, there is no conflict.

Finally, *Signet Bank/Virginia* v. *Tillis*, 196 Ga. App. 433, 396 S.E.2d 54 (1990), the only case Petitioner cites that discusses *Burger King*, does not conflict with the decision below because the facts are plainly distinguishable. *Signet Bank* involved a consumer credit card, not a commercial lease. There were no prior negotiations. The plaintiff made the offer and the nonresident accepted it outside the forum. The nonresident was a passive party, who was not required to do anything except send payments *if* he used the credit card. Each use of the credit card was a new, one-shot contract. The facts could hardly differ more from this case.

Therefore, Petitioner has failed to identify any conflict between the unanimous decision of the Ohio Supreme Court and the decision of any other jurisdiction.

III. THE UNANIMOUS DECISION OF THE OHIO SUPREME COURT IS SOUND POLICY AND PETITIONER'S SPECULATION THAT OTHER STATES MIGHT CHOOSE TO *EXPAND* IT TO HALE LESSEES INTO COURT UNDER CIRCUMSTANCES DIFFERENT FROM THIS CASE IS IRRELEVANT.

Petitioner's hypotheticals bear no resemblance to the particular facts of the decision in this case and are far outside the realm of the decision. The Ohio Supreme Court did not create a *per se* rule that all commercial lessees are amenable to personal jurisdiction under all circumstances. Nor is its decision a binding precedent outside Ohio. Indeed, Petitioner concedes that its "post office box" hypothetical is "extreme." (Pet. 18.) Even the "Alaska-California-Florida" hypothetical is "extreme." Nothing in the opinion below says jurisdiction would be proper on such scant facts. Typical of its approach to this case, Petitioner omits all detail of the nature and quality of the nonresident's contacts. Knocking down straw-men, Petitioner asks this Court to grant certiorari to review hypothetical cases that may or may not ever actually arise. By no means is it certain that other states will expand this Ohio decision to such different circumstances. Moreover, Petitioner forgets that personal jurisdiction usually involves a question of state law as well as federal due process. Other states are free to adopt and interpret their own long-arm statutes and rules more narrowly. Thus, if a nonresident commercial lessee is beyond the reach of the long-arm statute as a matter of state law, those states will never reach the federal due process issue reached in this case. There will be ample opportunity to review Petitioner's imagined worst scenarios if and when they become "actual cases and

controversies." Meanwhile, *Burger King* and the other precedents of this Court continue to provide adequate guidance.

Petitioner's argument also proceeds from the false premise that a nonresident should not be haled into court in the forum where the nonresident knowingly causes injury. Such a "policy" is contrary to the unbroken line of precedents of this Court.

> An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

Calder v. *Jones*, 465 U.S. 783, 790 (1984) (citing *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957) earlier in the opinion). *Accord Burger King*, 471 U.S. 462, 480 (1985). There is no reason to believe that commercial lessees as a class require special protection under a different due process standard.

Finally, Petitioner seeks nothing less than the judicial rewriting of contracts and leases. The decision of the Ohio Supreme Court does not preclude Petitioner or any other commercial lessee from bargaining with its lessor for a choice-of-*forum* clause or for other terms affecting the structure of their relationship, their contemplated future consequences, and their actual course of dealing. Like all other aspects of a commercial contract or lease, personal jurisdiction is a negotiable, economic term. Yet, Petitioner would constitutionalize a special federal advantage for all commercial lessees to the disadvantage of all commercial lessors. The present due process standards, however, adequately protect commercial lessees and lessors alike.

CONCLUSION

For all these reasons, Respondent respectfully urges this Court to deny the writ of certiorari.

Respectfully submitted,

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Counsel for Respondent

APPENDIX

[This is the Exhibit B Petitioner omitted from the appendix to the petition, Pet. 21a.]

December 28, 1987

Mr. Matt Smith
The Cafaro Company
2445 Belmont Avenue
P.O. Box 2186
Youngstown, Ohio 44504-0186

Re: Lease Agreement dated March 28, 1985
Landlord: Kentucky Oaks Mall Company
Tenant: Mitchell's Formal Wear, Inc.

Dear Mr. Smith:

Please find enclosed Mitchell's check in the amount of $7,000.00 pursuant to the oral agreement reached regarding cancellation of the subject Lease Agreement to be effective January 8, 1988.

Very truly yours,

Joseph B. Doyle

JBD/
Enclosures

EXHIBIT B

PLAINTIFF'S
TRANSCRIPT OF PROCEEDINGS
AND EXHIBIT ON APPEAL

STATE OF OHIO)
) SS.
COUNTY OF MAHONING)

IN THE COURT OF COMMON PLEAS

Case No. 88 CV 57

KENTUCKY OAKS MALL COMPANY,
Plaintiff

vs.

MITCHELL'S FORMAL WEAR, INC.
Defendant

APPEARANCES: Attorney JAY BLACKSTONE
On Behalf of Plaintiff

Attorney DANIEL P. DANILUK
On Behalf of Plaintiff

Attorney JEFFREY B. FLECK
On Behalf of Defendant

Attorney ARCHER D. SMITH, III
On Behalf of Defendant

BE IT REMEMBERED that at the trial of the above entitled cause, in the Court of Common Pleas, Mahoning County, Ohio, on the 8th day of June, 1988, before the Honorable WILLIAM G. HOUSER, the above appearances having been made, the following proceedings were had:

* * * *

[7] WHEREUPON, The Defendant called

JOSEPH B. DOYLE,

who, being first duly sworn,
testified as follows:

[8] THE COURT: Give that gentleman your full name and address, please.

MR. DOYLE: Joseph B. Doyle, 51 Inland Circle, Atlanta.

THE COURT: Atlanta, Georgia?

MR. DOYLE: Georgia.

* * * *

[14] CROSS EXAMINATION:

By Mr. Blackstone

Q Mr. Doyle, how long have you been President of Mitchell's?

A Ten years.

Q Ten years?

A Yes.

* * * *

Q And are you familiar with a Shopping Mall Development Corporation which goes by the name of JVJ?

A Yes.

Q Which is also possibly known as Jacobs, Visconsi [15] & Jacobs?

A I am, yes.

Q Are you?

A Yes, sir.

Q Are you located or is Mitchell's Formal Wear located in any JVJ Malls?

A Yes, we are.

Q Could you tell us which ones?

A We have several in the Carolinas.

Q Do you know where the JVJ home office is?

A Cleveland.

Q Cleveland, Ohio?

A Yes.

Q And do you have a copy of the lease in front of you for Kentucky Oaks —

A Yes.

Q And that's the one —

A I'm sure.

* * * *

[17] Q And could you also turn to paragraph 5 of the lease, or article 5?

A Yes.

Q And that paragraph is labeled "Percentage Rent". Could you read that and explain to the Court the mechanics of that paragraph?

A Well, the way "Percentage Rent" works is, if a tenant's sales are favorable, then a certain percentage of the sales above a specified level are tendered to the landlord as an additional rental payment, and in this case it is six percent of the specified amount of $200,000.00 for the first five years, and $225,000.00 for the second five years.

Q How does the landlord know whether you, whether Mitchell's Formal Wear has reached a particular level of gross sales?

A By periodic sales records that we submit to the landlord.

Q And in what form are those sales reports submitted?

A Well, they come from monthly and annual reports that are signed by an officer of the company.

[18] Q And which officer is that?

A Our Vice-President of Finance.

Q Could you turn to Article 6 of the lease?

A Yes, sir.

Q And without going into too much detail could you briefly summarize to the Court the mechanics of that paragraph; and in particular I'm really referring to the very first paragraph.

A Well, the very first paragraph states that we shall have the right to sell and rent formal wear on the demised premises.

Q And you couldn't sell hamburgers from that premises; is that correct?

A That's correct, not without approval.

Q Could you turn to Article 8 of the lease?

A Yes, sir.

Q And could you read the caption of that article?

A "Signs."

Q And in the interest of brevity and so that we are able to move along quickly, that paragraph means, for example, that you couldn't put up a sign with flashing lights, or you couldn't have an audio loudspeaker shouting into the mall that Mitchell's Formal Wear is doing business at this [19] particular unit; is that correct?

A Yes.

Q Basically the sign that you put up must be approved by the landlord?

A That's correct.

Q Okay.

A Basically any signs that we put up.

Q Could you turn to Article 11 of the lease?

A Yes, sir.

Q Which is labeled "Common Area Maintenance",

and also briefly could you state the mechanics of how that particular article works?

A Well, there are costs incurred in running a shopping center such as maintaining the parking lots, paying maintenance people, security people and so forth, and the tenants pay a pro rata share of these charges, costs, which are called "Common Area Maintenance."

Q Paid to whom?

A To the landlord.

* * * *

[20] Q Okay. We'll pass over that for now.

Could you also turn to Article 32 of the lease and tell this Court and me, if you can, and if you can't —

A Right.

Q Can you?

A Yes.

Q And also could you define the mechanics of that particular article?

A Yes. To promote the mall there is often times what is called a "Merchants Association" where the, the tenants of the shopping center contribute a specified amount of money on a periodic basis to the association which has the responsibility of furthering the success of the shopping center through promotions for the benefit of the tenants and so forth.

Q And Mitchell's Formal Wear, for example, would [21] pay a fee to the landlord; is that basically —

A A pre-determined fee, yes, that's correct.

Q To the landlord?

A That's correct, to the landlord.

* * * *

[22] Q Mr. Doyle, you're the President of Mitchell's Formal Wear?

A President.

Q And can you tell us how many entities or persons other than employees or shareholders of Mitchell's Formal Wear have access to the sales figures, gross sales figures of a particular store of Mitchell's Formal Wear?

A Gosh, that's pretty hard to say. We have all of the key personnel in the various stores throughout those states I mentioned. Like for Kentucky Oaks you have Kentucky as well as, ah, Georgia which has a portion involved. Then you would have Kentucky Oaks Company, the mall management. The people on sight certainly have that information. And, ah, I cannot speak for the number of people within Kentucky Oaks [23] Company that we have access, would have access to that. But that would be it. Internal Revenue Service, state.

* * * *

[40] **REPORTER'S CERTIFICATE**

I HEREBY CERTIFY that the foregoing is a true and correct transcript of all evidence introduced and proceedings had in the trial of the within named case as shown by my stenographic notes taken by me during the trial and at the time the evidence was being introduced.

/s/ RAYMOND D. TOMKO
Official Shorthand Reporter